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CITATIONS

Cases:

825045—49

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 574

UNITED STATES OF AMERICA, PETITIONER

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on November 20, 1948, by the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the district court (R. 35–37) is reported *sub nom. United States* v. *Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the court of appeals (R. 44–55) are reported at 170 F. 2d 752.

JURISDICTION

The judgment of the court of appeals was entered November 23, 1948 (R. 54–5). The jurisdic-

tion of this Court is invoked under 28 U. S. C. sec. 1254 (1).

QUESTION PRESENTED

Whether, when the United States condemns the use of leased property for an initial period less than the remainder of the lessee's term but with options in the Government to extend, and these options are exercised so as to extend Government occupancy beyond the lessee's term, there is a taking of the entire lease and consequently no liability to make compensation on account of the lessee's expense in moving personal property from the premises.

STATEMENT

The facts of this case, as stipulated by the parties (R. 28–31), may be summarized as follows:

On February 18, 1943, the United States filed a petition to condemn property in Springfield, Massachusetts, for a term ending the following June 30, "renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War * * *." Immediate possession was granted, and on May 1, 1943, notice was given that the Secretary had elected to extend the term to June 30, 1944. A similar notice was given May 25, 1944, extending the term to June 30, 1945. (R. 28–29.)

In April 1943, the United States deposited the sum of $18,654.58 as just compensation for the

term extending from February 18, 1943, to June 30, 1943, and, in May 1943 and May 1944, it deposited sums of $51,195.60 as just compensation for each of the annual extensions (ending June 30, 1945) (R. 29). It is agreed that these deposits, totalling $121,045.78 (R. 31), represent the fair market value of the bare unheated warehouse space for a term extending from February 18, 1943, to June 30, 1945 (R. 30).

At the time of taking, the Hodges Carpet Company owned the property, a portion of which was occupied by Westinghouse Electric & Manufacturing Co. under a lease expiring October 30, 1944 (R. 29, 32–5). Westinghouse surrendered possession to the United States shortly after February 18, 1943, and spent $25,600.00 in moving its personal property to a new location. It was stipulated that had the parties proceeded to trial witnesses for Westinghouse would testify that such amount was actually expended for labor, materials and transportation, that such expense was necessary, fair and reasonable, and it was agreed that the $25,600.00 amount represented the full and sole claim of Westinghouse to compensation (R. 29–30).

Upon these facts, judgment was entered, on November 24, 1947, for Westinghouse in the sum of $25,600 (R. 37–39),[1] and upon appeal this judg-

[1] The opinion on which the judgment was based was entered on June 12, 1947 (R. 35–37).

ment was affirmed, Chief Judge Magruder dissenting (R. 51–54). The district judge (R. 35–37) and the majority of the Court of Appeals thought that the rule laid down in this Court's decision in *United States* v. *General Motors Corp.*, 323 U. S. 373, was controlling. Chief Judge Magruder, however, took the view that this case was governed by the decision in *United States* v. *Petty Motor Co.*, 327 U. S. 372.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that respondent's expenses of removal from the premises, on which its lease expired on October 30, 1944, could be considered in determining just compensation to respondent for the taking of its leasehold, where the taking was for a term ending June 30, 1943, and also provided for additional yearly periods during the national emergency at the Government's option, and these options were actually exercised so as to extend the Government's term to June 30, 1945.

2. In holding that in these circumstances respondent was entitled to an award based on the costs of removing its personal property from the location in question to a new location.

3. In affirming the District Court's entry of judgment in favor of respondent.

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Petty Motor Co.*, 327 U. S. 372, this Court held that the rule applicable when fee title is condemned—that in determining just compensation consideration may not be given to the expense of moving removable fixtures and personal property from the premises[2]—likewise applies when, in the case of condemnation of a term for years, all of a tenant's interest is taken. The exceptional rule of *United States* v. *General Motors Corp.*, 323 U. S. 373, applies only when less than the tenant's entire interest is taken. The reason for the distinction was explained in the *Petty Motor* decision as follows (pp. 379–380):

> There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all takings of tem-

[2] The normal rule is, of course, that "evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings." *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–8; *Mitchell* v. *United States*, 267 U. S. 341, 344; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281; *United States* v. *General Motors Corp.*, 323 U. S. 373, 382.

porary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal.

Since the burden of establishing a right to compensation rests upon the condemnee (*United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266; *United States* v. *John J. Felin & Co., Inc.,* 334 U. S. 624, 631; *John Hancock Mut. Life Ins. Co.* v. *United States,* 155 F. 2d 977, 978 (C. A. 1); *United States* v. *Brooklyn Union Gas Co.,* 168 F. 2d 391, 398 (C. A. 2)), it was incumbent upon respondent to show that its claim came within the *General Motors* exception to the rule excluding consideration of removal costs, by proving that it was obligated to return to the leased premises at the end of the Government's use, or that responsibility for any period of the lease not taken rested upon it. No such showing was attempted, and respondent even made no claim to be compensated for the rent reserved. And, in fact, it was clear at the time of trial that the period of respondent's lease had terminated (on October 30, 1944) during the Government's occupancy, so that respondent could neither be compelled to resume any obligations, nor choose to avail itself of privileges, under the lease.

Thus, the position of the respondent is no different in substance from that of the *Petty Motor Co.,* and no reason appears why it should have

greater rights. There is no suggestion that its expenses of removal were any greater than they would have been if its entire term had initially been taken, and the parties' stipulation indicates that the contrary is true (R. 29–30, 31). There would seem to be no practical difference whether the duration of the Government's term depends upon an option to cancel as in the *Petty* case, or upon an option to renew as in the instant case. The result of the decision below would make consideration of removal expenses depend upon the form of words used to describe the interest taken by the Government. The distinction rests, we submit, not upon the form of words used, but upon the actual fact whether the Government occupies the premises for the entire remaining term of the lease.

The majority of the Court of Appeals thought that the rule of the *General Motors* decision was controlling because of the fact, stated in footnote 3 of that opinion, 323 U. S. at p. 376, that after judgment the condemnation petition in that case had been amended to include a right of renewal. But there was no showing that the Government had exercised this right,[3] and no discussion of what the result might be if renewals had actually extended the Government's occupancy beyond the lessee's term. In the *Petty Motor* opinion it

[3] See Rutledge J., concurring in the *Petty Motor* case, 327 U. S. at 383, and Magruder C. J., dissenting below (R. 53).

was pointed out, footnote 3, 327 U. S. at p. 375, that the *General Motors* case, in this Court, involved simply the original taking for one year. And we see no reason to believe, as does the majority below (R. 51), that either *General Motors* or *Petty* shows hostility to a district court's holding the matter of removal costs in abeyance until final judgment in the condemnation proceeding, so that these costs "could be considered or disregarded depending upon whether in fact the Government's use did or did not outlast the tenant's lease" (R. 51). However, the problem of holding the matter open is not necessarily involved here, for at the time of trial the Government's occupancy had already exceeded the full term of respondent's lease.

2. Since application of the distinction between the *General Motors* and *Petty Motor* cases substantially affects the compensation payable for taking of temporary interests, it is important that the matter be finally determined by this Court, particularly as a guide to future proceedings.[4] While the war with its multitude of such takings has ended, there are still many instances

[4] Cf. Magruder C. J., dissenting below (R. 54): "I think it is fair to say that neither my brethren nor I have complete confidence that we have drawn the correct inferences from the *General Motors* and *Petty* cases in aid of the contrary conclusions we have reached in our respective opinions. For that reason, it would not be unwelcome if the Supreme Court found an early occasion to review the whole matter."

in which property is needed for temporary Government use but not as a permanent installation, and the problem presented in this case will probably recur constantly. Thus, because of the current shortage of office space, proceedings to condemn temporary use have recently been brought to provide quarters for the administration of the Social Security Act (*United States* v. *Midland Nat. Bank of Billings*, 67 F. Supp. 268 (D. Mont.)), and for other governmental uses. A number of wartime cases, involving this question, also remain.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1949.

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